Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS S23–34 OF 2007 AND S22–266 OF 2010

LAU BEE LAN J

8 JANUARY 2013

Tort — Damages — Defamation — Publication of defamatory article in local newspaper — Allegations of misappropriation of funds — Allegation that senior official was 'running the affairs in NUBE in a manner that he solely desired' — Whether words or statements in articles defamatory — Whether words or statements complained of as contained in the articles referred plaintiffs — Whether words or statements as contained in articles were published

In the present suit, the first plaintiff, National Union of Bank Employees ('NUBE') and the second to eighth plaintiffs who were NUBE's then National Executive Council members ('the NEC'), sought damages for libel. The plaintiffs contended that the defendants had published/or caused to be published in the *New Straits Times* articles which were defamatory of the first plaintiff and the NEC. The publication of the four articles contained allegations of alleged misappropriation of NUBE funds made against the plaintiffs; the awarding of a RM2m contract for the renovations to NUBE's Port Dickson training centre; the purchase of NUBE's badges for RM40,000; and the approval of a RM40,000 study trip to Australia. The four articles expressly referred to NUBE and expressly stated the decisions in NUBE made were 'not approved by the NEC', 'without the endorsement of the exco', 'must seek the exco's approval first', 'without the endorsement of the NEC', 'without the approval of the NEC' and 'without … getting the approval of the NEC.' The sting of the four articles was that the one senior official in NUBE's Exco was 'running the affairs in NUBE in a manner that he solely desired' The first to fourth defendants admitted to the publication of the four articles but pleaded the defences of justification and qualified privilege. The sixth defendant admitted to being interviewed by the second and third defendants and therefore causing the publication of the first article and pleaded the defence of qualified privilege and contended that the allegations in the first article were true; In the alternative, the sixth defendant denied that he spoke or wrote, printed or published the first article either to the second and third defendants. Before the court, the plaintiff must prove that the words or statements as contained in the articles were defamatory; the words or statements complained

of as contained in the articles referred to the plaintiffs; and the words or statements as contained in the articles were published.

Held, allowing the claim:

(1) Although the words as contained in the articles did not specifically refer to the second to eighth plaintiffs, a reasonable person reading the articles would infer that reference was made to the plaintiffs as the second to eighth plaintiffs were all members of the first plaintiff at the material time (see para 21).

(2) To establish the ingredient of whether there was publication of the libel, the defamatory matter must be published to a third person other than the plaintiff, ie it is making known of the defamatory matter, after it had been written, to some person other than the person to whom it is written. Publication was a non-issue for the first to fourth defendants as they have admitted to the publication of the four articles. As for the sixth defendant, he had admitted in his defence of having lodged a police report and having been subsequently interviewed by the second and third defendants. The sixth defendant was responsible for the re-publication of the statements in his police report and the statements given to the second and third defendants (see paras 22–24).

(3) The plaintiffs contended that the first to fourth defendants have not adduced a single shred of evidence to prove the truth of the three main allegations wherein laid the sting of the defamatory statement. The defendants had not produced the two police reports referred to in the first article as there was no mention whatsoever of what the police reports were, in evidence (see paras 34–35).

(4) The first to fourth defendants did not produce any evidence of who wrote the fourth article and how it came to be written. Therefore there was nothing to link the fourth article to the police report and the court could not assume the same. The fourth defendant who wrote the second article stated that her source of the second article was the fifth defendant who made no mention of any police report whatsoever (see para 38).

(5) The first to the fourth defendants acted irresponsibly in publishing the four articles either without verifying the allegations contained therein or obtaining the plaintiff's side of the story. The first and fourth defendant's plea of qualified privilege must fail because the four articles were actuated by malice by reason of their failure to publish the plaintiffs' letter to the deputy director of the first defendant offering their version of the story after the publication of the first article (see paras 45–46).

(6) In assessing damages, the court is entitled to take into consideration the conduct of the plaintiff, his position, and standing, the nature of the libel, the mode and extent of publication, the absence of apology, the evidence

led in aggravation or mitigation of the damages. The court awarded the sum of RM250,000 as general and aggravated damages against the first to fourth defendants and RM10,000 against the sixth defendant which was fair and reasonable for the injury and embarrassment caused (see paras 66 & 72).

[Bahasa Malaysia summary

Dalam guaman ini, plaintif pertama, National Union of Bank Employees ('NUBE') dan plaintif kedua hingga kelapan yang mana merupakan ahli-ahli Majlis Eksekutif Nasional NUBE ('MEN') menuntut ganti rugi untuk libel. Plaintif-plaintif berhujah bahawa defendan-defendan telah menerbitkan/atau telah menyebabkan penerbitan artikel-artikel di dalam *New Straits Times* yang mana berunsur fitnah terhadap plaintif pertama dan MEN. Penerbitan keempat-empat artikel yang mengandungi dakwaan penyalahgunaan dana-dana NUBE dibuat terhadap plaintif-plaintif; pemberian kontrak RM2 juta untuk pengubahsuaian pusat latihan NUBE Port Dickson; pembelian lencana-lencana NUBE untuk RM40,000; dan kelulusan lawatan sambil belajar sebanyak RM40,000 ke Australia. Keempat-empat artikel dengan jelas merujuk kepada NUBE dan menyatakan keputusan-keputusan NUBE telah 'not approved by the NEC', 'without the endorsement of the exco', 'must seek the exco's approval first', 'without the endorsement of the NEC', 'without the approval of the NEC' and 'without … getting the approval of the NEC.' Sengat keempat-empat artikel adalah bahawa pegawai kanan Exco NUBE telah 'running the affairs in NUBE in a manner that he solely desired'. Defendan pertama hingga keempat mengakui penerbitan keempat-empat artikel tetapi telah memplid pembelaan justifikasi dan kepentingan bersyarat. Defendan keenam mengakui telah ditemu bual oleh defendan kedua dan ketiga dan justeru telah menyebabkan penerbitan artikel pertama dan memplid pembelaan kepentingan bersyarat dan berhujah bahawa dakwaan di dalam artikel pertama adalah benar; secara alternatif, defendan keenam menafikan dia telah bercakap atau menulis, mencetak atau menerbitkan artikel pertama sama ada kepada defendan kedua atau ketiga. Di hadapan mahkamah, plaintif hendaklah membuktikan bahawa perkataan atau kenyataan seperti yang terkandung di dalam artikel-artikel adalah berunsur fitnah; kata-kata atau kenyataan seperti yang diadu di dalam artikel-artikel merujuk kepada plaintif-plaintif; dan perkataan atau kenyataan yang terkandung di dalam artikel telah diterbitkan.

Diputuskan, membenarkan tuntutan:

(1) Meskipun kata-kata seperti yang terkandung di dalam artikel-artikel tidak secara spesifik merujuk kepada plaintif kedua hingga kelapan, seorang yang berfikiran waras yang membaca artikel tersebut boleh membuat inferens bahawa ia merujuk kepada plaintif-plaintif

memandangkan plaintif kedua hingga kelapan kesemuanya merupakan plaintif pertama pada masa matan (lihat perenggan 21).

(2) Untuk membuktikan unsur sama ada terdapat terbitan libel, perkara berunsur fitnah hendaklah diterbitkan kepada orang ketiga melainkan plaintif, iaitu perkara berunsur fitnah telah diketahui, selepas ianya ditulis, oleh orang selain daripada orang yang telah menulisnya. Penerbitan bukanlah suatu isu untuk defendan pertama hingga keempat memandangkan mereka telah mengakui penerbitan keempat-empat artikel. Bagi defendan keenam, dia telah mengakui di dalam pembelaannya bahawa dia telah membuat laporan polis dan telah kemudiannya ditemu ramah oleh defendan kedua dan ketiga. Defendan keenam bertanggungjawab untuk menerbitkan semula kenyataan-kenyataan di dalam laporan polisnya dan kenyataan-kenyataan telah diberikan kepada defendan kedua dan ketiga (lihat perenggan 22–24).

(3) Plaintif berhujah bahawa defendan pertama hingga keempat tidak mengemukakan sebarang keterangan untuk membuktikan kebenaran ketiga-tiga dakwaan utama yang membentangkan kenyataan yang berunsur fitnah. Defendan-defendan tidak mengemukakan kedua-dua laporan polis yang dirujuk di dalam artikel pertama memandangkan tiada apa-apa yang disebut tentang laporan polis dalam keterangan (lihat perenggan 34–35).

(4) Defendan pertama ke keempat tidak mengemukakan apa-apa keterangan tentang siapa yang telah menulis artikel keempat dan bagaimana ianya telah ditulis. Justeru tiada apa-apa yang dapat mengaitkan artikel keempat dengan laporan polis dan makhamah tidak mengganggap perkara yang sama. Defendan keempat yang telah menulis artikel kedua menyatakan bahawa sumber artikel keduanya adalah defendan kelima yang langsung tidak menyebut mengenai apa-apa laporan polis (lihat perenggan 38).

(5) Defendan pertama hingga keempat telah bertindak dengan tidak bertanggungjawab dengan menerbitkan keempat-empat artikel tanpa mengesahkan dakwaan-dakwaan yang terkandung di dalamnya atau mendengar cerita daripada pihak plaintif. Akuan kepentingan bersyarat defendan pertama dan keempat gagal kerana keempat-empat artikel tergerak daripada niat jahat disebabkan kegagalan mereka untuk menerbitkan surat plaintif-plaintif kepada pengarah kanan tentang defendan pertama menawarkan versi cerita mereka selepas penerbitan artikel pertama (lihat perenggan 45–46).

(6) Dalam menaksir ganti rugi, mahkamah berhak untuk mempertimbangkan tindak tanduk plaintif, posisinya dan standing, sifat libel, cara dan takat penerbitan, ketiadaan maaf, keterangan yang

membawakan kepada tambahan atau pengurangan ganti rugi. Mahkamah telah mengawardkan RM250,000 sebagai ganti rugi am dan tambahan terhadap defendan pertama hingga defendan keempat dan RM10,000 terhadap defendan keenam yang mana adil dan berpatutan untuk kerosakan dan rasa malu yang disebabkan (lihat perenggan 66 & 72).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 209–231.

Cases referred to

Abdul Aziz bin Jelani & Anor v Peter Chua Swee Lai [2000] 2 MLJ 462, HC (refd)

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor [2008] 3 MLJ 492; [2008] 6 CLJ 697, CA (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)

Binaan Sentosa Sdn Bhd v Ng In Kun & Anor [2012] 2 CLJ 232, HC (distd)

Bunt v Tilley [2006] 3 All ER 336, QBD (refd)

Carson v John Fairfax & Sons Ltd (1993) 113 ALJR 577, HC (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (not folld)

Chua Jui Meng v Hoo Kok Wing & Anor [2000] 3 MLJ 1, HC (refd)

Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 747; [2011] 1 LNS 167, HC (refd)

Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608, HC (refd)

Horrocks v Lowe [1974] 1 All ER 662, HL (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Jameel v Wall Street Journal Europe SPRL [2007] 1 AC 359, HL (refd)

Jones v Skelton [1963] 3 All ER 952, PC (not folld)

Kian Lup Construction v HongKong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)

Knupffer v London Express Newspaper, Ltd [1944] AC 116, HL (refd)

Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390, HC (not folld)

Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214, FC (folld)

Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor [2002] 4 MLJ 371, HC (refd)

Morgan v Odhams Press Ltd [1971] 2 All ER 1156, HL (refd)

National Union of General and Municipal Workers v Gillian [1946] KB 81, KBD (refd)

Reynolds v Times Newspapers Ltd [2001] 2 AC 127, HL (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (refd)
Subramaniam a/l Paramasivam v Courts Mammoth Bhd & Anor [2010] 9 MLJ 363; [2010] 1 LNS 904, HC (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (not folld)
Thian Oon Kin v Rekarya Consultant Group & Ors [2010] 8 MLJ 726, HC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (not folld)

Legislation referred to

Defamation Act 1957 ss 8, 12, 12(2), Schedule, Part I, Part II para 1(ii)
Rules of the High Court 1980 O 78 r 3(3)

Alex De Silva (Vinesh Mathew Varghese with him) (Bodipalar Ponnudurai De Silva) for the plaintiffs.
Harjinder Kaur (Josephie Sui with her) (Shahrizat Rashid & Lee) for the first to fourth defendants.
Ganesh Ponniah (Geh Cheng Lok & Co) for the sixth defendant.

Lau Bee Lan J:

[1] In this action the first plaintiff, National Union of Bank Employees ('NUBE') and the second to eighth plaintiffs (NUBE's then National Executive Council members) ('the NEC') are seeking for damages for libel.

[2] The plaintiffs contended that the defendants had published/or caused to be published in the *New Straits Times* the following articles which are defamatory of the first plaintiff and the NEC:

(a) article dated 22 July 2006 titled 'Reports lodged against NUBE Official' (bundle B p1) ('first article');

(b) article dated 29 July 2006 titled 'NUBE president expelled from union' (bundle B p2) ('second article');

(c) article dated 22 August 2006 titled 'Klang NUBE members in limbo' (bundle B p3) ('third article'); and

(d) article dated 4 September 2006 titled 'Ex-NUBE president lodges report over RM2m contract' (bundle B p4) ('fourth article').

[3] It is evident from the bylines that the first article was written by the second and third defendants whilst the second article was written by the fourth defendant.

[4] The first to fourth defendants in their defence have admitted to the publication of the four articles but have pleaded the defences of justification and qualified privilege.

[5] The sixth defendant in his defence (a) has admitted to being interviewed by the second and third defendants and therefore causing the publication of the first article and pleads the defence of qualified privilege and contends that the allegations in the first article were true; (b) further or in the alternative, denied that he spoke or wrote, printed or published the first article either to the second and third defendants.

[6] The court has considered the written submissions of the plaintiffs, first to fourth defendants and the sixth defendants (marked as 'K', 'M' and 'O' respectively) and their reply submissions (marked as 'L', 'N' and 'P' respectively), the oral clarifications and the authorities thereto. The court's findings are set out below.

FINDINGS

[7] It suffices for me to state that the law in an action for libel is trite and for purposes of this case, the burden of proof lies on the plaintiff to prove:

(a) the words or statements as contained in the articles must be defamatory;

(b) the words or statements complained of as contained in the articles refer to the plaintiffs; and

(c) the words or statements as contained in the articles were published.

Support for this proposition is the case *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC) at p 316 cited by the first to fourth defendants and the case of *Kian Lup Construction v HongKong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32 at pp 40–41 which followed *Ayob bin Saud*'s case.

WHETHER THE WORDS OR STATEMENTS IN THE ARTICLES ARE DEFAMATORY

[8] For ease of reference the statements contained in the articles of which the plaintiffs complained to be defamatory of the first plaintiff and the first plaintiff's EXCO are reproduced:

(a) first article;

Reports lodged against NUBE Official

By Ahmad Fairuz Othman and P. Selvarani

ALOR SETAR: Police reports have been lodged over alleged misappropriation of more than RM2million from the National Union of Bank Employees (NUBE) funds.

Two members of the union's Kedah branch lodged separately reports yesterday claiming that a NUBE official had used the money for three projects which were not approved by the NEC.

One of the two complainants, a 45-year old union member who declined to be named, said the official had awarded a RM2 million contract to a contractor to renovate NUBE's training centre in Port Dickson without the consent of union members.

It is alleged that the official had also approved a RM40,000.00 'study trip' to Australia for 10 of his close allies earlier this month.

He is said to have also misused about RM40,000.00 in extra charges for NUBE badges.

'He has no right to have taken such actions. He was acting on his own without seeking the approval of other members of the union' said the 45 year-old complainant.

(b) second article;

NUBE president expelled from union

By Rina De Silva

Abdul Jalil said he was unhappy that certain decisions had allegedly been made by a senior official without the endorsement of the exco.

This, he claimed, included a RM2 million contract awarded to a contractor to renovate NUBE's training centre in Port Dickson.

'The official had only informed me verbally before giving out the contract. I told him he must seek the exco's approval first' said Abdul Jalil.

He had also alleged that the official had approved a RM40,000.00 in extra charges for NUBE badges.

(c) third article;

Klang NUBE members in limbo

Abdul Jalil had said that he was unhappy that a senior official had made certain decisions without the endorsement of the NEC.

This included a RM2 million contract award to renovate NUBE's training centre in Port Dickson.

(d) fourth article;

Ex-NUBE president lodges report over RM2m contract

Kuala Lumpur: The controversy surrounding the National Union of Bank Employees (NUBE) continued as its former president lodged a police report against a senior NEC member.

Abdul Jalil Abdul Hamid made several allegations against the senior officer in his report lodged at the Jalan Bandar police station.

In his report, Abdul Jalil claimed the council member had awarded a RM2 million contract to repair and renovate the NUBE training centre in Port Dickson without calling for tenders and issued a cheque for 10 per cent payment to the contractor without the approval of the NEC.

He also claimed that the council member had approved a 10-man working visit to Australia and New Zealand without first submitting a costing for the trip or getting the approval of the NEC.

[9] In construing whether the words complained of are capable of bearing a defamatory meaning, Gopal Sri Ram JCA (as he then was) in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374E firstly opined that in essence it is a question of law that turns on the construction of words published and drew support from the Privy Council case of *Jones v Skelton* [1963] 3 All ER 952 at p 958:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

[10] Thereafter His Lordship opined at p 374H–I that:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[11] Further in the same case at p 375A, His Lordship approved the approach taken by Richard Malanjum J (now CJSS) in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 namely:

> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

(See also *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58D–E right column, *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 at p 399A–D right column).

[12] The plaintiffs contended that the defamatory statements in their natural and ordinary meaning and by reference to its context, meant and were understood to mean as pleaded in paras 32.1–32.7 of the statement of claim:

> 32.1 the members of [NEC] did not approve the three projects and one or more officials of NUBE were misappropriating funds for their own and their own cronies benefit.
>
> 32.2 that there was a misuse of funds in the awarding of tender for the renovation works at the NUBE training centre.
>
> 32.3 that there was dishonesty in the billing of the badges.
>
> 32.4 that the expenses for the 10 members who went to Australia were not sanctioned by the Executive Committee of NUBE.
>
> 32.5 the removal of Abdul Jalil as the Chairman of Penang Branch Committee was as a result of exposing the issue of misappropriation of NUBE fund to its members.
>
> 32.6 the NUBE officials in the Union are corrupt and cannot be trusted. Senior officials are responsible for the misappropriation of NUBE funds.
>
> 32.7 the plaintiffs as principal office bearers of NUBE namely, Sandagran Solomon a/L Joseph Pitchay, Abdul Zaman bin Abdullah, Chen Ka Fatt, Mohamed Dauzkaply Nor bin Ghazali, Oui Ban Hong, Rosida binti Abd Mutalib and Tan Eng Hong were responsible for the misappropriation of NUBE funds.

[13] Further the plaintiffs pleaded in para 33 of the statement of claim:

> 33. In consequence the plaintiffs contend damage has been caused to the plaintiffs in that their reputation, credit and character have been gravely injured, they have been exposed to public scandal, contempt, embarrassment and distress and their feelings have been hurt.

[14] It is not disputed the publication of the four articles contained three

main allegations of alleged misappropriation of NUBE funds made against the plaintiffs:

(a) the awarding of a RM2m contract for the renovations to NUBE's Port Dickson training centre;

(b) the purchase of NUBE's badges for RM40,000; and

(c) the approval of a RM40,000 study trip to Australia.

[15] Applying the test propounded in the cases cited above, I am of the opinion 'the ordinary reasonable persons using their general knowledge and common sense' would undoubtedly draw the inference as contended by the plaintiffs in para 8 above and which would have the effect of lowering the plaintiffs in the estimation of right-thinking members of society generally.

[16] In this connection whilst I do not disagree with the principles alluded to in the host of cases cited by the first to fourth defendants, I find there is no merit in their submission that the alleged defamatory words pleaded by the plaintiffs do not impute the plaintiffs and there was no innuendo pleaded by the plaintiffs as to the particulars of the facts which are defamatory of the plaintiffs.

[17] Further, there is evidence adduced in cross-examination from the third defendant, Miss Sofea Amani Selvarani bt Abdullah ('DW1') and from Encik Ahmad Fairuz bin Othman, the second defendant ('DW2') that the articles had cast serious imputations on the first plaintiff and its office bearers, the second to eighth plaintiffs and which would have the effect of tarnishing the image of the same. Extracts of the testimonies of the DW1 and DW2 in respect of the first article are:

(a)

ADS

But, Miss Selvarani, you, you, would you agree, not agree with me, that if a report is made, as in this case, against a NUBE official, that's what it says and it says RM2 million has been misappropriated from NUBE's funds, all right. I mean, that's what the report says and numerous projects had been, had been approved without council approval. Now isn't that the, the, the implication from these allegations of, of the, of these statements, of the, NUBE is a, is badly runned. And the people who are running NUBE may well be corrupt and there is something wrong with NUBE. Isn't that right?

SOFEA

Yes, that's correct.

…

ADS

It's a very serious imputation, do you agree with me?

SOFEA

Yes, yes, that's correct.

…

ADS

On NUBE, the first Plaintiff, it also cast imputations on the people who are running the, the office bearers of NUBE, would you not agree?

SOFEA

Yes.

(NOP Vol 4 pp 12–14);

(b)

ADS

By looking at your article, page one, let's look at your article. Says here police reports have been lodged over alleged misappropriation of more than RM2 million from National Union of Bank Employees' Funds, right? It goes on to talk about, NUBE, that NUBE has also used the money for three projects which were not approved by the executive council. You would agree with me, Encik Ahmad Fairuz, that these allegations, serious allegations made against NUBE and also the officials running NUBE, the allegations, serious allegations, you would agree with me?

AHMAD

Yes, I agree.

…

ADS

It would also have the effect of tarnishing the image of the officials, the office bearers in NUBE. You would agree with me?

AHMAD

Yes, I agree.

…

ADS

Abdul Jalil said he was unhappy that certain decisions had allegedly been made by senior, by a senior official without endorsement of the Exco. This, he claimed, include the RM2 million, the contract awarded to a contractor to renovate the NUBE's Training Centre in Port Dickson. The official had also informed me verbally saying contract it was, so on, so forth and study trip, the badges. Again, the same allegations are repeated with regards to the same three issues that you have raised earlier, isn't that true? In your first article.

AHMAD

Yes.

ADS

And you would agree with me that the allegations here would have the effect of, the same effect that is, it would tarnish the image of NUBE and the officials, not the officials, the office bearers in NUBE, right? It's, it's the same thing.

AHMAD

Yes.

(NOP pp 101–103).

WHETHER THE WORDS OR STATEMENTS COMPLAINED OF REFER TO THE PLAINTIFFS

[18] In the English case of *National Union of General and Municipal Workers v Gillian* [1946] KB 81 at p 87, the English Court of Appeal held that since a trade union can sue in tort, there is no ground for excluding an action in libel and the trade union can claim redress in respect of a libel which relates to their conduct in carrying out the object as a trade union. Thus following this persuasive authority the plaintiffs are entitled to claim for libel.

[19] On the issue of whether the four articles refer to the plaintiffs, ie on the question of identity, the test to be applied is as propounded in:

(a) *Knupffer v London Express Newspaper, Ltd* [1944] AC 116 at p 121 on the two staged process:

> There are two questions involved in the attempt to identify the appellant as the person defamed. *The first question is a question of law — can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact — Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?* Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative. I move that this appeal be dismissed.

(Emphasis added.)

(b) *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 (HL) at pp 1176 –1177 (which referred to *Knupffer*):

> … But here the question is not whether the words are defamatory. It is conceded they are, if they refer to the plaintiff. The question is one purely of identity. 'Are the words capable of being understood to refer to the plaintiff?'

> In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say 'I wonder if the article refers to Johnny Morgan' nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff.
>
> (See *Gatley on Libel and Slander*, (10th Ed), at pp 182–184 wherein it is stated that the claimant must also identify himself as the person defamed and the test is whether the claimant may reasonably be understood to be referred to by the words.)

[20] On a perusal of the four articles, it is observed that they expressly refer to NUBE and expressly stated the decisions in NUBE made were 'not approved by the NEC', 'without the endorsement of the exco', 'must seek the exco's approval first', 'without the endorsement of the NEC', 'without the approval of the NEC' and 'without … getting the approval of the NEC'. There is evidence that NUBE is one of the largest trade union in the country has a membership of about 29,000 members (according to PW1) and more than 34,000 members (according to DW1). The sting of the four articles is that the one senior official in NUBE's Exco was 'running the affairs in NUBE in a manner that he solely desired'.

[21] Although the words as contained in the articles do not specifically refer to the second to eighth plaintiffs, a reasonable person reading the articles would, in the opinion of this court infer that reference was made to the plaintiffs as the second to eighth plaintiffs were all members of the first plaintiff at the material time.

WHETHER THE WORDS WERE PUBLISHED

[22] The next issue is whether the defamatory statement was published. To establish the ingredient of whether there is publication of the libel, the defamatory matter must be published to a third person other than the plaintiff ie it is making known of the defamatory matter, after it has been written, to some person other than the person to whom it is written (see *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 at p 176).

[23] As for the first to fourth defendants, publication is a non issue as in their defence, they have admitted to the publication of the four articles.

[24] As for the sixth defendant, he has admitted in his defence of having lodged a police report at Balai Polis Alor Setar, Kedah No 12324/06 (bundle D

pp 56–57) and having been subsequently interviewed by the second to third defendants. I find the sixth defendant is responsible for the republication of the statements in his police report and the statements given to the second to third defendants (see *Chua Jui Meng v Hoo Kok Wing & Anor* [2000] 3 MLJ 1 at pp 11 I–12 D; *Bunt v Tilley* [2006] 3 All ER 336 at p 342 paras 21–23).

WHETHER THE DEFENDANTS CAN SET UP THE DEFENCE OF JUSTIFICATION?

[25] Having found that the plaintiffs has established on a balance of probabilities the three elements necessary to make out a libel case against the defendants, I shall now examine the defences raised by the first to fourth defendants and the sixth defendant, the first of which is justification.

[26] In order for the first to fourth defendants to succeed on the defence of justification in relation to the first to fourth articles and for the sixth defendant, in relation for the first article, it is incumbent for them to prove the truth of the three main allegations made against the plaintiffs, to reiterate, with respect to:

(a) the awarding of a RM2m contract for the renovations to NUBE's Port Dickson training centre;

(b) the purchase of NUBE's badges for RM40,000; and

(c) the approval of a RM40,000 study trip to Australia.

[27] It is without doubt that the burden to prove the defence of justification ie that the defamatory statements are true or the truth of all material statements in the libel lies squarely with the first to fourth defendants and sixth defendant throughout as per the two Federal Court decisions cited by the plaintiffs in the *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC) at p 89 D–F left column) and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66 at p 72 D–F left column).

[28] The court is also mindful of s 8 of the Defamation Act 1957 which provides:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[29] It is not disputed that the first article was written by DW1 (the third defendant) commencing from the third column from the words 'The police

reports came' till the end of the first article; she submitted to the news desk whereby the story was later merged with the story submitted by DW2 (the second defendant) who wrote the firstto eighth paragraphs of the first article. DW1 stated on 20 July 2006 she received a tip off from her source and called the fifth defendant to confirm the information who (a) confirmed about the alleged misappropriation of funds; (b) told that the Kedah NUBE was going to lodge a police report over the matter; and (c) then she called the seventh plaintiff and received his comments before writing the story (WSDW1 Q&A 15).

[30] However in cross-examination, DW1 admitted that since there was no police report on 20 July 2006 when she called the seventh plaintiff, she said she only asked him about the fifth defendant's removal as chairman of the Penang branch and did not ask about the three main allegations as there were no police report at that time (NOP Vol 3 p 139). DW1 said she has no knowledge why there was no response from the first defendant to (a) the e-mail dated 25 July 2006 (exh P1 in bundle E p 1) from the seventh plaintiff sent in his capacity as general secretary of NUBE to the deputy director of the first defendant, Tuan Syed Nazri Syed Harun enclosing the plaintiff's version of the first article; and (b) the letter dated 24 July 2006 on NUBE's letterhead from the seventh plaintiff in the capacity as the general secretary of NUBE (exh P2 in bundle E pp 5–6) titled 'NUBE REPORT IN THE NST DATED 22ND JULY 2006 'Reports lodged against NUBE official" requesting for correction of the facts on an equal publicity basis on the version prepared by NUBE as per the said letter. DW1 also has no knowledge whether the first defendant has made any effort of contacting NUBE and getting their version of events of the allegations claimed by DW1.

[31] The second, third and fourth articles contained only Abdul Jalil's version and contained no version from NUBE although NUBE's version on the three allegations was already communicated to the first defendant and DW1 has no knowledge why there is no response from NST.

[32] DW2 said on 20 July 2006, he received instructions from the Kedah Bureau Chief to check whether there was a police report made by certain individuals in Kedah in relation to NUBE matters. And on 21 July 2006, he contacted a NUBE Kedah contact to check whether there was any police report made and he was told there were two police reports made in respect of NUBE matters (Q&A 7–8 WSDW2).

[33] In cross-examination DW2 has shown himself not to be a credible witness as it is observed that although he is called as a witness of fact, yet repeatedly his answers were he could not remember and at times the answers

were not logical or credible at all. To illustrate my point I cite the following evidence:

(a)

ADS

Who told you that these two police reports were made?

AHMAD

I don't remember exactly but I, I assume it must've been my contact in Kedah NUBE.

…

ADS

Now, you were told that two police reports were made. Did you, were you given the police reports? Or did you see these police reports?

AHMAD

I must have at least been told about the police reports.

ADS

You must have been told about the police reports.

AHMAD

Because I don't remember exactly.

(NOP Vol 4 p 73);

(b)

ADS

You already know, you were told. So did you see those two police reports?

YA

So, did you see?

AHMAD

Yes, I saw those two.

…

ADS

So, you, you, you saw it, you made copies of those police reports?

AHMAD

I don't remember.

ADS

You don't remember.

…

ADS

But wouldn't it had been natural for you as a journalist who's going to write an article to have made a copy of those reports? I mean you need a source right. Your source is the police reports. So would you need to have made copies of this police reports?

AHMAD

Yes, I would have, yes.

ADS

You would have. So where are those police reports?

AHMAD

I don't remember, Yang Arif.

…

ADS

You don't. You don't remember, where, where is it?

…

ADS

Do you know where it is?

AHMAD

No, I do not know where it is.

…

AHMAD

Because it has been a long time.

…

AHMAD

More than five years.

(NOP Vol 4 pp 74–76);

(c) DW2 stated that his lawyers spoke to him about one month ago (from date of proceeding on 14 February 2012) and prior to that he was not asked for a copy of the police report. Normally he would when writing a story keep the source in the file but in this case said 'But when the stories are from many, many years ago, the articles associated with them are misplaced'. DW2 admitted (a) Alor Setar Report No 1234/06 dated 21 July 2006 (bundle D pp 56–57 (transcript of the same appears at p 124 English translation of the sixth defendant's statement of defence) to be

one of the reports he sighted; (a) he did not attempt to get any response from NUBE regarding the allegations in the police report; (b) the allegations in the police report were made against the seventh plaintiff; (c) it was important to contact the person against whom the allegations were made or at least a member of the executive; (d) if contact was not done he would not get a balanced article (NOP Vol 4 pp 86–88);

(d)

ADS

Did you conduct any independent verification exercise to verify these facts apart from looking at the police report?

AHMAD

I don't remember, Yang Arif.

…

ADS

The allegations that you have put in here are all those that are contained in the police report, nothing else. You didn't conduct any independent investigation, isn't that true?

AHMAD

Yes, Yang Arif.

(NOP Vol 4 pp 89–90);

(e) later DW2 admitted Alor Setar Report No 12324/06 dated 21 July 2006 (bundle D pp 56–57; transcript of the same appears at p 124 English translation of the sixth defendant's statement of defence) to be one of the reports he sighted. When DW1's attention was drawn to the Minutes of the 6th National Executive Council Meeting dated 9 June 2006 (p 52) and asked whether he knew the sixth defendant was struck off his membership and as chairman of the NUBE Kedah Branch (p 52) and that the whole Kedah branch was closed down at the time the sixth defendant lodged the report, DW2 merely replied 'I don't remember'; and

(f)

ADS

As at 22nd of July. So your report there is inaccurate. Because you said two members of the Union's Kedah Branch lodged separate members (sic - should read 'reports').

YA

Not a member of NUBE as at 22nd July 2006. So answer?

AHMAD

I disagree.

…

ADS

How do you disagree? The facts are the facts. You can't change them.

AHMAD

Because I wouldn't have reported anything that was untrue.

ADS

You just did.

AHMAD

I don't remember the case.

…

ADS

… there was no Kedah Branch in existence, there was no Kedah NUBE Branch in existence as at 22nd July 2006. Did you, do you recall making any checks on that?

AHMAD

No, I don't recall, Yang Arif.

(NOP Vol 4 pp 96–97).

[34] Reverting to the mainstream, the plaintiffs contended that the first to fourth defendants have not adduced a single shred of evidence to prove the truth of the threp main allegations (see para 17 above) wherein lies the sting of the defamatory statement. I agreed with the contention of the plaintiff for the following reasons.

[35] Firstly, the defendants had not produced the two police reports referred to in the first article as there is no mention whatsoever of the what the police reports were in the evidence-in-chief of DW1 and DW2 and in cross-examination it became more apparent both DW1 and DW2 were clueless as to the identity of the two police reports referred to in the first article. Thus in this context the case of *Binaan Sentosa Sdn Bhd v Ng In Kun & Anor* [2012] 2 CLJ 232, can be distinguished in that the police report therein is clearly identified unlike the factual matrix of the present case. The cases of *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747; [2011] 1 LNS 167 and *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 are not relevant as they did not deal with the contents of a police report per se. Furthermore these three cases were cited by learned counsel for first and fourth defendants to establish the

point that the allegations made were for investigative purposes and therefore the words complained of are not defamatory of the plaintiff and not in the context of the defence of justification.

[36] To reiterate it is trite that the burden is on the defendants is to prove the truth of the three main allegations made against the plaintiffs which is based on interview with the fifth defendant and police reports (para 13(a)–(f) of the statement of claim. I find the defendants have failed miserably. Instead of identifying the two police reports which the first to fourth defendants were relying on in the pleadings from the outset, they attempted to latch on to evidence adduced in the cross-examination by learned counsel for the plaintiffs when grappling with the question of identifying the police report referred to in the first article which the defendants were seeking to justify.

[37] Even if the court is to take it at its highest that the Alor Setar Report No 12324/06 dated 21 July 2006 (bundle D pp 56–57) is one of the reports, the sixth defendant admitted in cross-examination that he has no knowledge of the contents of the said police report he lodged and he claimed that the report was lodged on the instructions of the fifth defendant (NOP Vol 6 p 44–46/85–88). The sixth defendant was no longer a member of NUBE as at 21 July 2006 and was terminated as member on 9 June 2006.

[38] In the case of the fourth article, the first to fourth defendants sought to introduce the Jalan Bandar police report dated 30 August 2006 lodged by the fifth defendant (bundle J pp 18–21) only on the morning of the trial (on 17 February 2012) only through the fifth defendant. I agreed with learned counsel for the plaintiffs that the first to fourth defendants did not produce any evidence of who wrote the fourth article and how it came to be written; therefore there is nothing to link the fourth article to the Jalan Bandar police report and the court cannot assume the same. Even DW3, the fourth defendant who wrote the second article stated that her source of the second article was the fifth defendant who made no mention of any police report whatsoever.

[39] The fifth defendant, Abdul Jalil bin Abdul Hamid in his letter of apology dated 19 October 2011 (bundle C p 151) stated that (a) his statements in respect of the above three main allegations (para 17) were 'completely unfounded' which he in cross-examination agreed meant 'that [he] has no basis for making the allegations'; and (b) he admitted 'Yes, yes, yes' when queried whether he genuinely felt as expressed in the letter of apology that '[He] … unreservedly apologize to all the plaintiffs' and thereafter he further withdrew 'all the said allegations and all imputations upon the conduct and character of the plaintiffs' (NOP Vol 9 pp 26–27). The court is mindful of the fact that prior to giving evidence the fifth defendant who was subpoenaed by the first to fourth defendants had expressed his desire to be discharged as a witness as (i) he

had given a letter of apology; (ii) was due to retire in 20 days' time; and (iii) counsel for the plaintiffs alerted the court in the event the fifth defendant at trial retracted his apology, the plaintiffs would reinstate the case against him. The court refused the fifth defendant's application. Given this backdrop, I find the fifth defendant was cautious when testifying at both examination-in-chief and cross-examination stage and the fifth defendant after being afforded the opportunity whether he wanted to withdraw or change anything in the letter of apology during cross-examination, replied he had signed and did not want to. In my judgment the letter of apology which was given first in time and given unequivocally by the fifth defendant would undermine any plea of justification.

[40] The plaintiffs submitted they have adduced evidence that the contents of the four articles were untrue vide (a) the Minutes of the 1st Emergency NEC (National Executive Council) Meeting on 24 July 2006 (bundle C pp 1–16 at pp 7–8 captioned 'Agenda 3: Adverse Report In The New Straits Times dated 22.7.2006'), (b) the Minutes of the 6th NEC Meeting on 9 June 2006 (bundle C pp 43–63 at pp 7–8 at pp 57–58 captioned 'Agenda 8 - PD Training Center') and (c) the Minutes of the 3rd NEC Meeting on 5 December 2005 (exh D3 captioned 'Agenda 2 - Solidarity Month - January 2006' at p 5 showed that the three main allegations in the four articles concerning the NUBE badges, the RM2m contract awarded for the renovation of the Port Dickson Training Center and the study trip to Australia were false as they were approved by the NEC.

[41] The first to fourth defendants argued that the Minutes of the 1st Emergency NEC Meeting could not be relied upon as it was post event and what was sought was a reconfirmation of approval of the three issues and questioned the probative value of the Minutes of the 6th NEC Meeting as (a) it was signed by S Sivabalan in his capacity as president of NUBE when he was a council member and the fifth defendant was only expelled and removed as a member and president after the meeting on 28 July 2006; and (b) it was undated and there was a probability it was prepared after the publication of the first article dated 22 July 2006.

[42] Notwithstanding the observations made by the first to fourth defendants' counsel, the fact remained that both the fifth to sixth defendants were present at all the meetings and approved the same. In any event, 'In a suit for defamation, once the words complained of are proved to be defamatory and published, the respondent being the plaintiff is not bound to prove the falsity of these words because the law presumes it to be in his favour'. However the burden lies with the defaming party to prove the truth of the defamatory statements at all times and the onus does not shift to the person defamed (see *International Times & Ors* at p 89D–F).

A WHETHER THE DEFENDANTS ARE ENTITLED TO THE DEFENCE OF QUALIFIED PRIVILEGE

B **[43]** To succeed on the defence of qualified privilege, the first to fourth defendants have to prove they meet the criteria in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 as held by Lord Nicholls of Birkenhead of the House of Lords at p 205A–C:

> C Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify D the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. E A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

F **[44]** The contents of the four articles which were in relation to the alleged misappropriation of funds in NUBE which comprised more than 34,000 members throughout Malaysia would be a matter attracting general public interest. After having examined the evidence in the present case, I find the following criteria as per the *Reynolds*' case have not been satisfied. Although the G allegations made against the plaintiff were serious as it concerned the purported misappropriation of millions of dollars, the first to fourth defendants had:

(a) failed to independently verify the contents of the police report prior to reporting the same; and

H (b) neglected to obtain the comments of the plaintiffs regarding the three main allegations contained in the first article prior to publication of the same;

I (i) although DW1 (the third defendant) had contacted the seventh plaintiff. The first to fourth defendants contention that DW1 believed what was told to her by the fifth defendant is of little probative value especially since DW1 knew full well that the fifth defendant had been expelled as the chairman of NUBE's Penang Branch Committee on 19 July 2006 and should have treated his statement with caution;

(ii) likewise, DW2 (the second defendant) admitted he made no attempts to contact the plaintiffs for comments (see para 33(c) above) although he conceded it was important to contact the seventh plaintiff or any executive member of NUBE; and

(iii) in respect of the second article, the fourth defendant (DW3) stated she attempted to contact the seventh plaintiff on 28 July 2006 using the telephone operator but failed and did not sms as it was a land line and failed to conduct further investigation as she had to meet a deadline (NOP Vol 5 pp 12–13; 22–23) which is telling of recklessness on the part of the first to fourth defendants in the publication of the four articles. When DW3 called and spoke to the fifth defendant via phone, she testified he had already been expelled from NUBE during the union's Exco meeting held on 28 July 2006 and DW3 admitted the fifth defendant was an unhappy man as he had told her so and as printed in the second article; yet DW3 testified she did not consider the state of mind of a person before publishing (NOP Vol 5 p 51). This is another instance of recklessness in publishing the four articles on the part of the first and fourth defendants.

[45] The first to fourth defendants in my judgment acted irresponsibly in publishing the four articles either without verifying the allegations contained therein or obtaining the plaintiff's side of the story. Whereas the Court of Appeal has held in the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374F–I to p 376A that newspapers do not have a special position in law of libel and that it is incumbent upon to act responsibly when publishing by means of the print or electronic media. Hence in the circumstances of the instant case, the first to fourth defendants is not entitled to the protection of qualified privilege as held in the case of *Abdul Aziz bin Jelani & Anor v Peter Chua Swee Lai* [2000] 2 MLJ 462 at p 468F–G:

> What the defendants have failed to take into account is the case of *Horrocks v Lowe* [1974] 1 All ER 662 decided by the House of Lords but which the judge of the sessions court considered; that 'the defamer is entitled to the protection of privilege if he can prove he has positive belief in the truth of what he published or honest belief. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is treated as if he knows it to be false'.

[46] Furthermore in my judgment the first and fourth defendant's plea of qualified privilege must fail because the four articles are actuated by malice by reason of their failure to publish the plaintiffs' letter dated 24 July 2006 (bundle E pp 2–6) to the deputy director of the first defendant offering their version of the story after the publication of the first article. In this connection, the second, fourth, seventh and eighth plaintiffs had gone to the first

defendant's office on 24 July 2006 to meet the deputy group editor of the first defendant to give the plaintiffs' side of the story in response to the first article. As they were unable to meet the said person, the seventh plaintiff emailed a copy of the letter dated 24 July 2006 to the deputy group editor of the first defendant on 25 July 2006 which was subsequently personally delivered on even date (bundle E p 1).

[47] Of material importance in this regard is the first to fourth defendants did not deny receipt of the email and the said letter sent to the deputy group editor of the first defendant. Despite the express denial of the contents of the first article vide the said email and letter dated 24 July 2006, the first to fourth defendants went ahead to publish the other three articles. DW1, DW2 and DW3 could not proffer any cogent reason as to why the said letter of the plaintiffs was not published. This is yet another instance of publishing recklessly (see *S Pakianathan* at p 179F–G). Further, the failure of the first and fourth defendants to publish the plaintiffs' comments on the allegation contained in the four articles would in my view defeat the protection of qualified privilege relied on by the first to fourth defendants (see *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 MLJ 371 at p 384D).

[48] At this juncture it is appropriate for me to address whether the first to fourth defendants can rely on the defence of qualified privilege pursuant to s 12 of the Defamation Act 1957. Section 12 of the Defamation Act (relevant part) reads:

> (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule in this Act shall be privileged *unless the publication is proved to be made with malice*. (Emphasis added.)

[49] To determine whether the publication of the four articles fall within the items specified in Part I of the Schedule to the Defamation Act, it is pertinent to reproduce the provision:

> 1 A fair and accurate report of proceedings —
>
> (a) of the legislature of any part of the Commonwealth other than in Malaysia;
>
> (b) of an international organisation of which Malaysia or the Government thereof is a member;
>
> (c) of an international conference to which the Government sends a representative;
>
> (d) before any court exercising jurisdiction throughout any part of the Commonwealth (as defined in the Constitution) outside Malaysia or

a court martial held outside Malaysia under any written law in force in Malaysia or under any Act of the United Kingdom Parliament; and

(e) of a body or person appointed to hold a public enquiry by the Government of Malaysia or any State thereof or by the legislature of any part of the Commonwealth outside Malaysia.

2 A fair and accurate copy of or extract from any register kept in pursuance of any written law in force in Malaysia which is open to inspection by the public or which members of the public are entitled to have searched or of any other document which is required by any such law to be open to inspection by the public or to which members of the public are entitled on payment of a fee to a copy.

3 A notice, advertisement or report issued or published by or on the authority of any court within Malaysia or any Judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

[50] Having regard to the aforesaid provision, it is crystal clear that the statements contained in the four articles do not fall within any of the categories specified in Part I of the Schedule to the Defamation Act and thus the first and fourth defendants cannot rely on s 12 of the Defamation Act.

[51] There is an added reason why the defence of qualified privilege under s 12 of the Defamation Act is not available to the first to fourth defendants. Section 12(2) of the Defamation Act provides:

(2) In the action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

[52] Having regard to para 1(ii) of Part II of the Schedule to the Defamation Act read with s 12(2) of the same, in my view the first and fourth defendants' failure to have published the plaintiffs' letter dated 24 July 2006 to the deputy group editor of the first defendant by way of explanation showed the first to fourth defendants could not avail themselves of the defence of qualified privilege under s 12 of the Defamation Act.

[53] As for the sixth defendant, besides stating in cross-examination he has no knowledge of the contents of the Alor Setar report and all the information was provided by the fifth defendant, the sixth defendant stated that his

intention for making the said report was (a) for the police to investigate whether the allegations of misappropriation of funds by a senior NUBE official were true and (b) to protect himself from the perceived wrongdoings and also for the interest of members of NUBE.

[54] However the sixth defendant ('DW4') can only rely on the defence of qualified privilege if he could prove that he had positive belief in the truth of what was published or honest belief (*Horrocks v Lowe* [1974] 1 All ER 662). However I find the evidence during cross-examination revealed that he had lodged the police report containing the defamatory statements as part of a nationwide campaign to discredit the leadership of NUBE:

> ADS
>
> So there was going to be a concerted campaign to make police reports against at that time the existing NUBE leadership. Correct? All round the country, isn't that what that was the thing?
>
> DW4: 6th defendant
>
> Okay, Jalil told me this. But my main concern is.
>
> …
>
> DW4: 6th defendant
>
> As stated inside there, this, Jalil, all the branches are going to make a police report about this.
>
> …
>
> ADS
>
> The fact that Jalil told you that all his branches were going to make police reports suggested there was like a, there was like a campaign being organized by Jalil against the present NUBE leadership at that time, correct? In 2006. To make police reports; it was a concerted effort, it was an organized campaign to make police reports against the then NUBE leadership in 2006, correct?
>
> DW4: 6th defendant
>
> Yeah but it is not.
>
> ADS
>
> The campaign lead by Jalil.
>
> DW4: 6th defendant
>
> Yes, I agree with that.
>
> ADS
>
> Your police report, one of the police reports was part of this campaign, lah.
>
> DW4: 6th defendant

Supposed to be, yeah.

(NOP Vol 6 pp 80–81).

[55] The fact that the Alor Setar and the Jalan Bandar police reports lodged by the sixth and fifth defendants respectively were part of a nationwide campaign to discredit the first plaintiff's leadership was further confirmed by the fifth defendant in cross-examination. Relevant extracts of the testimony of the fifth defendant ('DW5') are:

ADS

No, no, they were very unhappy about the closures and the fact that they were expelled from NUBE. Wasn't that correct?

JALIL

Yes.

ADS

So this would be in 9th June. Encik Jalil, about a month later, 28th of July 2006, isn't it true that you were then expelled from NUBE and removed as president of NUBE?

JALIL

Yes.

ADS

So all these police reports, the police reports that you were shown earlier, all the complaints to all the various government authorities, that is to DGTU and to the police, the Surat Aduan, and the laporan, all this came about after you were expelled and after all these members were removed and expelled, is that true? Isn't it true that a big group of them as well as I'm not sure, I won't say a big group. There was a group, I would say there was a group of members who then decided that they would fight your expulsion from NUBE and your removal as president from NUBE, isn't that true? You've got to speak louder.

JALIL

Yes, yes.

ADS

So, isn't it also true that this group together with yourself decided that one of the ways that you will use to go against NUBE was to lodge complaints with all these authorities and also make police reports against NUBE, isn't it true?

ADS

That you would lodge complaints against the NUBE leadership then and also lodge police reports against the leaders, specifically I think it was Solomon, isn't that true?

JALIL

A Yes.

(NOP Vol 9 pp 37–39)

[56] Thus I find the sixth defendant could not avail himself of the defence of
B qualified privilege as the evidence showed that he did not believe that what he published was true and 'this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without
C endorsing, defamatory reports made by some other person' (see *Abdul Aziz bin Jelani*) at p 469E–F).

[57] The sixth defendant's application to amend his pleading just before trial commenced was not allowed by the court. The sixth defendant sought to delete
D his defence wherein he had admitted to being interviewed by the second and third defendants in Suit S6–23–34 of 2007) and thereby caused the publication of the first article (paras 6–7 of his statement of defence) and substituting it with a new para 6 which in essence completely denied the fact that he was interviewed by the second and third defendants. In my judgment,
E the sixth defendant is bound by his pleadings and he could be allowed to contradict his defence (*Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC) at p 25A–B; G–H).

[58] Further, I held the view that the sixth defendant has made an admission
F in his pleadings and he could not attempt to contradict the same and additionally, he could not now deny that he has in fact directly contributed to the publication of the first article (see *Thian Oon Kin v Rekarya Consultant Group & Ors* [2010] 8 MLJ 726 at p 731 para 15).

G ORDER 78 R 3(3) OF THE RULES OF THE HIGH COURT 1980 ('RHC')

[59] Order 78 r 3(3) of the RHC reads:

H (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged
I occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[60] Basically the first to fourth defendants contended the plaintiffs have

failed to file a reply to defence under O 78 r 3(3) of the RHC giving particulars of the facts and matters from which the malice is inferred since the plaintiffs have alleged that the defendant was actuated by express malice. The first to fourth defendants relied on the Court of Appeal case of *Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492; [2008] 6 CLJ 697 and *Subramaniam a/l Paramasivam v Courts Mammoth Bhd & Anor* [2010] 9 MLJ 363; [2010] 1 LNS 904 where the High Court held O 78 r 3 of the RHC operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply giving particulars of the facts and matters from which malice is to be inferred.

[61] The case of *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214 concerns an appeal against a High Court decision on the question of slander arising from a counterclaim. The learned trial judge found the occasion was a privileged one but held that the words spoken at the meeting to settle matters were spoken out of malice and the defence of qualified privilege failed. The appellant appealed and one of the grounds (last ground) was that the learned judge should have held that the words were spoken out of malice as the respondent had not delivered a reply to the appellant's claim of privilege. The Federal Court at p 217A–C left opined:

> The proviso states that if plaintiff intends to allege that defendant was actuated by express malice he shall deliver a reply giving particulars of facts and matters from which such malice is to be inferred. I should point out the proviso speaks of express malice. Thus, *Mallal's Supreme Court Practice* at p 266 cites *Smith*'s case to say where, in order to succeed, it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. *The point is that if plaintiff has already alleged malice in his statement of claim the proviso does not come into play*. Consequently, the last ground must also fail.
>
> (Emphasis added.)

[62] Para 34 of the plaintiffs' statement of claim in Kuala Lumpur High Court Civil Suit No S6–23–34 of 2007 and para 20.1 of the plaintiffs' statement of claim in Alor Setar High Court Civil Suit No 22–266 of 2010 had fully particularised the plea of malice against the defendants. Hence following the ratio in *Luk Kai Lam* wherein the proviso to O 19 r 22 of the RSC is in para materia with O 78 r 3(3) of the RHC, the plaintiffs need not file a reply to defence under O 78 r 3(3) of the RHC since the plaintiffs had already done so in the statement of claim.

[63] The case of *Anne Lim Keng See* at p 722 merely refer to the meaning of 'malice' and does not support the defendants' case whilst the case of

Subramaniam Paramasivam made no reference to the Federal Court decision of *Luk Kai Lam*.

DAMAGES RECOVERABLE

[64] Since I had on a balance of probabilities found the defendants are liable to the plaintiffs for libel, I now turn to the amount of damages to be awarded to the plaintiff.

[65] The defendants contended that the plaintiffs are not entitled to damages as the plaintiffs had not pleaded particulars of loss and damage in the statement of claim. This contention is devoid of merit as there is no necessity for the plaintiffs to do so as held in *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 at p 372B–C:

> The tort of libel has long been recognised as actionable per se. Thus where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful justification, he need not plead or prove special damage in order to succeed.

[66] In assessing damages, the court is entitled to take into consideration the conduct of the plaintiff, his position, and standing, the nature of the libel, the mode and extent of publication, the absence of apology, the evidence led in aggravation or mitigation of the damages: see *Gatley on Libel and Slander* at p 509 para 1380 as cited in *Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608 at p 626I (case cited by the plaintiffs).

[67] In *Carson v John Fairfax & Sons Ltd* (1993) 113 ALJR 577 which was cited in *Dato' Dr Tan Chee Khuan* at p 627B–C, the High Court of Australia enunciated damages are awarded for defamation for three purposes:

> … The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant.

[68] In this present case I am mindful that:

(a) the first plaintiff is a union with branches throughout Peninsular Malaysia with a large membership of about 34,000 members and the second–eighth plaintiffs are the office bearers;

(b) there was no apology forthcoming from any of the defendants; for that matter there was no response to the letters of demand sent by the plaintiffs' solicitors before the commencement of the suits attempting to

mitigate the wrongful acts. These letters included plaintiffs' solicitors' letters dated 10 August 2006 (bundle C pp 64–68) and 8 September 2006 (bundle C p 69) to the first defendant seeking amongst others the publication of the plaintiffs' side of the story; and a letter dated 2 October 2006 (bundle C pp 73–75) seeking, amongst others, a withdrawal of the police report dated 21 July 2006; and

(c) there were four publications by the first to fourth defendants in the *New Straits Times*, a newspaper having wide circulation on four separate occasions on 22 July 2006, 29 July 2006, 22 August 2006 and 4 September 2006.

[69] In *Gatley on Libel and Slander* (10th Ed), at p 828 para 26.28 (cited by the sixth defendant) the learned author stated 'A claimant is accordingly required to give details of any matters on which he will rely in aggravation of damages, such as malicious conduct on the part of the defendant'.

[70] Next, in my view the following passage on aggravated damages by the learned author of *Mehrotra's Commentary on Law of Defamation Damages & Malicious Prosecution (Civil & Criminal)* (5th Ed), 2004 referred to in *Dato' Dr Tan Chee Khuan* p 628 G–H is instructive:

> [39] For aggravated damages, the learned author *Mehrotra's Commentary on Law of Defamation Damages & Malicious Prosecution (Civil & Criminal)* (5th Ed), 2004 had referred to *Mc Carey v Associated Newspapers Ltd* [1964] 3 All ER 947 (CA) and said:
>
> > Therefore, aggravated damages, may be awarded within the compensatory principles; in circumstances, specifically referred to above, viz, if there has been any kind of high-handed oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering, which is caused by defamation and which may constitute injury to the plaintiff's pride and self-confidence … What then are the injuries, for which the plaintiff should be compensated?

[71] The first to fourth defendants was reckless (a) in not verifying the allegations contained in the four articles prior to publishing the same; (b) had acted with express malice in publishing the second to fourth articles after having received the plaintiffs' letter dated 24 July 2006 and email dated 25 July 2006 expressly denying the contents of the first article.

[72] As for the sixth defendant, learned counsel submitted the sum awarded should not exceed RM5,000 contending that the sixth defendant had not maliciously made the police report as he had honestly believed he had reasonable grounds for believing that what he wrote was true. With regret I

A disagreed with the said contention as I found that the sixth defendant acted out of malice against the plaintiffs in having lodged the Alor Setar police report dated 21 July 2006.

B **[73]** Having regard to the aforesaid principles and the circumstances alluded to, I awarded the sum of RM250,000 as general and aggravated damages against the first to fourth defendants and RM10,000 against the sixth defendant which I am of the opinion is fair and reasonable for the injury and embarrassment caused.

C **Conclusion**

[74] On a balance of probabilities I held that the plaintiffs had proven their case and entered judgment in their favour in the sum mentioned in para 73 above.

D

[75] The other prayers granted were:

(a) an injunction restraining the first defendant by its directors, servants or agents or otherwise howsoever and the second to sixth defendants, and each of them by themselves, their agents, servants or otherwise howsoever from printing or publishing or causing to be printed or published the statements complained of by the plaintiffs published in the *New Straits Times* on 22 July 2006, 29 July 2006, 22 August 2006 and 4 September 2006 or any similar words defamatory of the plaintiffs;

E

F

(b) interest at the rate of 8%pa on damages awarded from the date of filing the action until the date of judgment and thereafter interest at the rate of 4%pa on damages awarded from the date of judgment until the date of full and final settlement;

G

(c) costs in the sum of RM60,000 to be paid by the first to fourth defendants to the first plaintiff; and

(d) costs in the sum of RM1,000 to be paid by the sixth defendant to the first plaintiff.

H

Claim allowed.

Reported by Afiq Mohamad Noor

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